No. 89-1420

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HERMAN WEINER,

Petitioner,

vs.

DOUBLEDAY & COMPANY, INC.
and SHANA ALEXANDER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

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Question Presented

Whether this Court has certiorari jurisdiction to review the decision of the Court of Appeals of the State of New York, granting Respondents summary judgment in this libel action on the ground that, as a matter of New York state law, no genuine, triable issue was raised as to whether Respondents had acted in a grossly irresponsible manner in publishing certain statements about Petitioner, where (1) the Court of Appeals' decision rested on an adequate and independent state ground and does not implicate any substantial federal question and (2) Petitioner's newly fashioned "due process" claim is wholly meritless, was never raised below and no state court ever passed upon this issue.

Listing Pursuant to Rule 28.1

The parent companies of Bantam, Doubleday, Dell Publishing Group, Inc., the successor to Doubleday & Company, Inc., are Bertelsmann Publishing Group, Inc., Bertlesmann, Inc. and Bertelsmann A.G. There are no subsidiaries of Bantam, Doubleday, Dell Publishing Group, Inc.

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COUNTER-STATEMENT OF THE CASE

A. Preliminary Statement

This is a libel action brought by Petitioner Herman Weiner, a psychologist, against the experienced author and

journalist, Shana Alexander ("Alexander") and Doubleday & Company, Inc. ("Doubleday"), in connection with a book written and published, respectively, by Respondents, entitled Nutcracker (hereafter "Nutcracker" or the "Book").

The New York Court of Appeals, on appeal by Petitioner from the Appellate Division, First Department, affirmed the Appellate Division's award of summary judgment in favor of Respondents, on the sole ground that Petitioner had failed to come forward with evidence sufficient to raise a triable issue whether Respondents had been grossly irresponsible in publishing certain statements made about Petitioner in the Book. Because the Court of Appeals' decision rested entirely on adequate and independent state law grounds, there is no issue of federal law that properly may be

considered by this Court. The standard of gross irresponsibility is part of the substantative state law of defamation applicable in New York to actions brought by a private figure arising out of a publication involving a matter of legitimate public concern. The standard reflects New York's decision to protect speech involving matters of public concern above the minimum standard of fault which the federal Constitution requires a private defamation plaintiff to prove.

Determination of which state standard of fault is applicable and the application of that standard to the facts of the case both involve the interpretation of state law only, as the Court of Appeals' opinion -- and several of this Court's decisions -- make clear. These state law questions do not become, as Petitioner

argues, federal questions simply because New York law limits the requirement of a showing of gross irresponsibility to speech involving matters of public concern and, coincidentally, various federal constitutional requirements are also triggered when such public speech is involved.

Nor can Petitioner create some abridgement of a federal right or "liberty" interest out of nothing more than the fact that he lost his libel action. This strained effort to come within the jurisdictional prerequisites of 28 U.S.C. §1257(a) is without merit, particularly since the interest he claims was abridged -- his reputation -- is protected under state law and not the federal Constitution. Moreover these claims were never raised or passed upon in any of the state courts below.

Therefore, this issue cannot be properly raised for the first time in the Petition for a Writ of Certiorari.

B. The Book

In the Book, Alexander reported on the family turmoil surrounding the widely publicized murder of the Mormon multi-millionaire Franklin Bradshaw by his grandson, Marc Schreuder, who carried out the murder at the instigation of his mother (Bradshaw's daughter), Frances Schreuder. The Book, subtitled Money, Madness, Murder: A Family Album, explores the tragic family history that led to the killing and convictions of Marc and Frances Schreuder (A-129).*

Alexander, with forty years of experience as a journalist, commentator,

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* References are to the Appendix attached to the Petition before this Court.

editor and author, and numerous professional awards to her credit, assisted by an experienced investigative reporter, interviewed more than 250 individuals, including Frances Schreuder and all of the surviving members of her family (A-127, 130).

This extensive investigation produced not simply a factual report of the murder of Franklin Bradshaw and the subsequent convictions of his daughter and grandson. Rather, as the subtitle makes clear, the "Family Album" is a psychological portrait of the Bradshaw family, and, as the Court of Appeals found, "the failure of family and professional figures to halt the progression of Schreuder's illness before it resulted in murder" (A-15-16). Nutcracker presents this portrait by following the twisted path of perceptions, misperceptions and outright

delusions of the various family members which, over their years of interaction and reaction, developed into the tragic criminal psychosis presented in the form of a "Family Album" (A-3-4, 43).

Frances Schreuder was Petitioner's patient during the 1960's and in 1982, after she had been indicted for murder (A-169, 173). During an acrimonious divorce proceeding between Frances and her first husband in the mid-1960's, involving the question of custody of their two sons, Petitioner had testified in open court that Frances was a "fit mother" (A-28) -- surely the most controversial of opinions in view of subsequent events, including the conviction of one son for grandpatricide instigated by his mother and the hospitalization of the other for the attempted murder of his roommate.

In the context of describing the bitter views and psychotic relationships of the various family members, Alexander referred to Petitioner in two paragraphs in her 431-page Book. Although additional language in the nature of adverse opinions by members of the family was originally challenged by Petitioner, Petitioner's most recent appeal focused on only two sentences (underscored below) in which Alexander reported on comments regarding Petitioner's relationship with Frances made by four of her intimates. The comments were offered by Richard Behrens (Frances' close friend, confidant and subsequent government witness in Frances' murder trial), Berenice Bradshaw (Frances' mother) and by Marilyn and Robert Reagan (Frances' sister and brother-in-law), and tellingly reflected

their own cynical views about psychiatric care.

> In 1966 Frances put herself for two years under the care of a Park Avenue psychiatrist named Herman Weiner, who seems to have encouraged his patient to stand up to her overprotective mother. Berenice was attempting to infantilize her, Frances decided. She told Mark that Granny had a neurotic need for "babies to smother," which could account for Berenice's intense dislike of the man she began to habitually refer to as "Weenie, the big, fat, ugly Jew."
>
> Robert Reagan remembers Dr. Weiner arriving in court to testify for Frances, during the divorce proceedings eccentrically costumed in bright red slacks and a loud plaid jacket. Marilyn Reagan remembers the size of one of his bills: Frances owed her psychiatrist $3,000. "My understanding was that her problem was inability facing reality," says Marilyn. The huge unpaid bill made her sister think it might be the psychiatrist who had this problem, not his patient. Later, when Behrens claimed that "Frances always slept with her shrinks," the Reagans said they were not at all surprised. They'd suspected "hanky-panky," they confessed. Berenice had said the same. [A-4-5; emphasis added.]

This passage is consistent with the Book's overall methodology, typical of "true crime" works, which offered the reader, as the Court of Appeals found, "[l]argely a pastiche of statements by interviewees who are unendorsed and at times openly disparaged by Alexander herself ..." (A-10).

C. The Decisions Below

On the parties' cross-motions for summary judgment, the trial court not only denied Respondents' motion for summary judgment but made the virtually unprecedented decision of granting Petitioner's motion for summary judgment.

The Appellate Division, First Department, unanimously reversed, concluding, inter alia, that the references to Petitioner were presented as pure opinion and not facts, citing "cautionary passages" throughout the Book

signalling the reader that merely opinion was being offered (A-44-45). In addition, the intermediate appellate court also concluded that the standard of fault of gross irresponsibility adopted as New York law in Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 379 N.Y.S.2d 61, 341 N.E.2d 569 (1975), was applicable because the statements at issue involved matters of public concern and the standard had not been satisfied as to either defendant (A-40, 49).

The Court of Appeals unanimously affirmed the Appellate Division's grant of summary judgment in favor of Respondents, holding that Petitioner "has failed to come forward with evidence sufficient to raise a triable issue of fact as to whether [Respondents] satisfied their duty of care under Chapadeau" (A-16). Applying

well-established New York law of both defamation and summary judgment, the Court of Appeals held that both Alexander, whose "experience and reputation are unquestioned" (A-17), and Doubleday, in reliance thereon, had obtained reasonable confirmation of the statements in question, "given the narrow circle of people whom it would have been productive to question" in this "'carefully locked and guarded household.'" (A-4, 17, 18).

In the course of its review of Respondents' investigation, the Court specifically noted the multiple interviews of Behrens who proved himself knowledgeable about the intimate details of Frances' life both in the interviews and later at trial (A-17-18). The statements from other family members, the Court specifically found, were accurately

reported and generally corroborative (A-18).

As to Petitioner's argument, advanced in this Petition as well, that the subject matter fell outside the sphere of legitimate public concern and, therefore, a simple negligence standard should be applied, the Court disagreed, ruling:

> We are unpersuaded by plaintiff's contention that a simple negligence standard should govern. Plaintiff does not dispute that the general subject of "Nutcracker" falls within the Chapadeau guidelines, but argues that the particular topic of his relationship with Frances Schreuder is a detour from legitimate public concern into the realm of mere gossip and prurient interest. This is precisely the sort of line-drawing that, as we have made clear, is best left to the judgment of journalists and editors, which we will not second-guess absent clear abuse (Gaeta v. New York News, [Inc.,] 62 N.Y.2d 340, 349[, 477 N.Y.S.2d 82, 465 N.E.2d 802 (1984)]). "Nutcracker" is, in part, clearly intended as an inquiry into the failure of family and professional figures to halt the progression of Schreuder's illness before it resulted in murder. Her

> relationship with plaintiff is not so remote from that subject as to constitute a clear abuse of editorial discretion. [A-15-16.]

REASONS FOR DENYING THE PETITION

I.

THE NEW YORK COURT OF APPEALS' DECISION RESTED ON AN INDEPENDENT AND ADEQUATE STATE LAW GROUND AND PRESENTS NO QUESTION OF FEDERAL LAW WARRANTING REVIEW

This Court's statutory authorization for accepting cases on certiorari from a state's highest court extends, in relevant part, to those cases "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution ..." 28 U.S.C. §1257(a) (Supp. 1989). The power to review judgments from the highest state court is limited to review of judgments involving federal rights:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

Because the portion of the Court of Appeals' decision from which review is sought rests solely on an adequate and independent state ground, this Court has no jurisdiction to grant the writ of certiorari. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977); Henry v. Mississippi, 379 U.S. 443, 446 (1965). The decision could not have been more plain in finding for Respondents on the state law ground that Petitioner had failed to present a triable issue of fact as to whether Respondents had published the Book in a grossly irresponsible manner. Only the

decision in Respondents' favor on the state law ground is the subject of this Petition.

To avoid the consequences of this unambiguous decision, Petitioner offers a decidedly devious characterization of the Court of Appeals' decision as "crafted to appear as a fact-dependent application of wholly uncontroversial legal standards, and thus not an appropriate candidate for review by this Court," but which cannot "hide the violations of petitioner's constitutional rights" (Petition at 24-25). But casting aspersions on the motives of the seven judges of the New York Court of Appeals cannot suffice to create a federal question when the state law ground was clearly and unequivocally the basis of the decision. Compare Michigan v. Long, 463 U.S. 1032, 1040-41 (1983)(Supreme Court will accept

jurisdiction where basis of state decision is not clear and "fairly appears" to rest primarily on federal law or to be interwoven with federal law).

Both what level of fault is to be applied beyond the constitutionally-mandated minimum and the application of that standard to determine whether a triable issue exists, are strictly matters of state law. The standard of fault applied in this case was that announced by the Court of Appeals in Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d at 199, as the law of New York:

> [W]here the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed ... must establish ... that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.

In adopting the gross irresponsibility standard, the Court of Appeals was acting "within the limits imposed by the Supreme Court" (id.) in express response to this Court's invitation: "[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

The interest in preventing and redressing injury to reputation is primarily a state interest, and it is the states that have the primary responsibility for protecting that interest. Id. at 341, 348 (recognizing "strong and legitimate state interest in compensating private individuals for injury to reputation"). The defamation

remedy is thus a creature of state law. The federal constitutional dimension of libel disputes comes into play only when state tort law conflicts with the protections afforded by the First Amendment.

The Gertz Court found that strict liability for defamation actions, even those brought by private plaintiffs about speech that did not involve matters of public concern, conflicted with the protections afforded by the First Amendment. Id. at 346. It likewise found that the Constitution did not require states to apply the actual malice standard of fault when private plaintiffs bring defamation actions, regardless of whether the speech is about purely private matters or matters of public concern. Instead, states were allowed, but not required, to apply a "less

demanding" standard provided it was not liability without fault. Id. at 347-48. Within these constitutional boundaries, the Gertz Court concluded that the states should retain "substantial latitude in their efforts to enforce legal remedy for defamatory falsehood injurious to the reputation of a private individual." Id. at 345-46.

Exercising that latitude, the New York Court of Appeals adopted the middle ground of gross irresponsibility -- something less than actual malice but more than the constitutional minimum of negligence -- when a private plaintiff brings a defamation action about a publication involving a matter of public concern. Petitioner does not and cannot challenge the constitutionality of the "gross irresponsibility" standard, but rather, merely challenges its application

in this case on the ground that the subject matter here is not "arguably within the sphere of legitimate public concern" (Petition at 26-31). But in so arguing, Petitioner fails to present any issue of federal constitutional law warranting review by this Court.

The mere fact that New York law looks to whether the report involves a matter of legitimate public concern as the triggering mechanism for the application of its higher standard of fault and that, coincidentally, various constitutional burdens have been held by this Court to be triggered by a similar finding, does not federalize New York's standard. Since New York, free of any constitutional constraint, may adopt a rule making gross irresponsibility or any other standard of fault applicable even when the subject is not a matter of

public concern, a fortiorari, its decision that the subject in this case was within the scope of legitimate public concern and thus the gross irresponsibility standard applied, is of no constitutional moment.

This situation is thus in contrast to those cited by Petitioner where constitutional burdens on the libel plaintiff are triggered by whether the subject is a matter of legitimate public concern. In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), relied on by Petitioner (Petition at 24, 30-31), a plurality of this Court concluded, as the Gertz Court had previously, that the Constitution required a finding of actual malice before presumed or punitive damages could be awarded to a private plaintiff when the subject was a matter of legitimate

public concern. That constitutional requirement did not apply to purely private defamation actions, where no issue of public concern was reported. Id. at 761. Since the constitutional requirement turned on this finding, the Court reviewed the state court's determination that the credit report at issue did not involve an issue of public concern and that a verdict against the defendant was thus properly based on the lower standard of fault. Id. at 762.

Similarly, in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), also relied on by Petitioner (Petition at 23), this Court held that when articles involving matters of public concern are at issue, the burden of proving falsity shifts to the plaintiff, even when he is not a public official or public figure. This modification of the

common law rule was mandated by the First Amendment. Id. at 776.

The fact that New York has elected to impose a higher standard of fault for liability if the speech involves a matter of public concern, only demonstrates that New York's law is consistent with the trend of these decisions to give greater protection to speech involving matters of public concern in recognition that "speech of public concern is at the core of the First Amendment's protections." Id. at 778 (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. at 758-759).

In this case, however, the Court of Appeals, in giving broad scope to what state law deems to be a matter of public concern, looked to its own precedent -- Gaeta v. New York News, Inc., 62 N.Y.2d

340 -- not to federal law (A-15). Thus, Petitioner's claim that this Court has jurisdiction on the ground that the Court of Appeals misconstrued federal precedent in reaching its decision (Petition at 26-28) is simply not accurate since state law was the only source cited as authority. Compare California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 92 n.5 (1981)(federal basis for decision found where Supreme Court precedent but no state authority was cited).

The precedent with which Petitioner apparently takes issue, espoused by the Court of Appeals in this case and in Gaeta, looks to the "judgment and discretion" of editors and journalists in defining what is a matter of public concern.

> Determining what editorial content is of legitimate public interest and concern is a function for editors. ... [E]ditorial judgments as to news content will not be second-guessed so long as they are sustainable.

Gaeta v. New York News, Inc., 62 N.Y.2d at 349. That deference, adopted as a matter of state law, is, contrary to Petitioner's contention (Petition at 29-30), also wholly consistent with this Court's refusal to intervene in matters involving editorial selection of what is and is not worthy of publication. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 255-56 (1974)(rejecting a law that required newspapers to publish a reply by a political candidate).

In any event, the application of the state law standard to the facts of the case before the Court of Appeals is clearly binding on and not reviewable by this Court. See, e.g., Williams v.

Kaiser, 323 U.S. 471, 473 (1945); Smith v. O'Grady, 312 U.S. 329, 330 (1941).

In this case, the Court of Appeals applied New York defamation law to conclude that the reporting in the Book on Petitioner's relationship with his former patient was a matter of public concern, specifically finding that the relationship was "not so remote" from the "inquiry into the failure of family and professional figures to halt the progression of Schreuder's illness before it resulted in murder" (A-15-16). That finding seems particularly compelling in light of Petitioner's pronouncement of Frances Schreuder as a fit mother (A-28) and the tragic events that followed.

The Court then applied New York's summary judgment rules and New York's higher fault standard of gross irresponsibility to find that Petitioner

"has failed to come forward with evidence sufficient to raise a triable issue of fact as to whether defendants satisfied their duty of care under Chapadeau" (A-16). In reaching this conclusion, the Court of Appeals closely and carefully reviewed the extensive investigation by Alexander and concluded that she had accurately reported the comments of those in "the narrow circle of people whom it would have been productive to question" (A-17-18): family members and Frances' closest confidant, Richard Behrens, whose credibility and knowledge of Frances was established in multiple interviews and at Frances' trial.* These are classic determinations of state law as applied to

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* While the Court of Appeals did not specifically discuss whether Alexander should have questioned Frances Schreuder or Petitioner, as

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specific facts that this Court does not review.*

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Petitioner has urged (A-38-39), the Appellate Division did conclude that, given the psychologist/patient privilege, Respondents "had no reason to anticipate [Petitioner] would discuss the details of his relationship with Ms. Schreuder with them" (A-43).

* This decision in the media defendants' favor based solely on the application of state law is in sharp contrast to those instances, relied on by Petitioner (Petition at 27-28, 34-35), where this Court has reviewed the application of the constitutional standard of fault of actual malice by lower courts when the result below was against the media defendant. E.g., Harte-Hanks Communications Inc. v. Connaughton, ___ U.S. ___, 109 S.Ct. 2678 (1989)(review of a decision by a federal jury and an affirmance by a federal appeals court that the media defendant had published with constitutionally required standard of fault of actual malice); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)(review of decision by a federal appeals court, interpreting and applying Rule 56 of the Federal Rules of Civil Procedure

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II.

PETITIONER'S "DUE PROCESS" ARGUMENT, IN ADDITION TO LACKING ANY FOUNDATION IN LAW, WAS NEITHER RAISED IN NOR PASSED UPON BY ANY COURT BELOW

The notion -- not at all explained or justified in the Petition -- that Petitioner has a constitutionally

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which denied summary judgment to media defendants on the ground that a jury could find constitutional actual malice).

In each instance, the question before the Court was whether the unsuccessful media defendant's rights under the First Amendment had been abridged by the finding that the constitutional standard of fault had been met. See also Time Inc. v. Firestone, 424 U.S. 448 (1976)(review of state court verdict against media defendant, affirming that successful libel plaintiff was not a public figure and, therefore, burden of proving constitutional standard of actual malice not required); Gertz v. Robert Welch, Inc., 418 U.S. 323 (review of federal court determination in media defendant's favor, reversing finding that private figure libel plaintiff had burden imposed by Constitution of proving actual malice).

cognizable "liberty" interest in recovering for "reputational injury in his profession", which theoretically was abridged in violation of the due process clause when the Court of Appeals ruled against him, is purely a figment of Petitioner's legal imagination, concocted at this late stage solely to provide a federal question for review by this Court.

Quite simply, the argument has no apparent foundation in fact or in law. Certainly, Petitioner has failed to cite any authority for the proposition that the right to recover for alleged reputational injury is a "liberty" interest in itself protected under the due process clause.

As discussed above under Point I, the interest in protecting the reputation of individuals derives not from the federal Constitution, but is a "strong and

legitimate state interest." Gertz v. Robert Welch, Inc., 418 U.S. at 348. The federal interest intercedes only by way of a privilege derived from the First Amendment that protects the publisher of speech and "delimits a State's power to award damages" in libel actions. New York Times v. Sullivan, 376 U.S. 254, 283 (1964). While this Court may on occasion redefine the scope of that privilege, there is no federal constitutional right of "reputation," such as Petitioner asserts here, that is abridged by application of the First Amendment privilege. Were it otherwise, every libel claim could be brought in federal court, regardless of diversity of citizenship, under federal question jurisdiction and every unsuccessful libel plaintiff could claim an appealable federal issue.

In essence, Petitioner's "due process" claim amounts to nothing more than a complaint that the courts below failed to rule in his favor. Petitioner has no more constitutional standing than any other disappointed litigant who has lost some interest, be it in the nature of reputation or property or some other tangible or intangible interest, as a result of an unfavorable decision. Petitioner's "due process" claim invites wholesale review by this Court of a state court's application of state law and, as such, should be rejected.

Quite apart from the "due process" claim's total lack of merit, there are procedural deficiencies which prohibit review. As the Petition, void of any references to the record, makes clear, this issue was never raised at any stage of the proceeding below, and certainly

none of the state courts considered this "due process" claim.

This Court does not review a federal constitutional issue when, as here, that issue was neither raised in nor passed upon by the highest state court.

> It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause."

Durley v. Mayo, 351 U.S. 277, 281 (1956) (quoting Williams v. Kaiser, 323 U.S. at 477). See also Street v. State of New York, 394 U.S. 576, 581 (1969)(Supreme Court may not review a constitutional issue if it was not presented to the state court "in such a manner that it was necessarily decided" by the state's

highest court); Cardinale v. State of Louisiana, 394 U.S. 437, 438 (1969)(although certiorari was granted to consider constitutional question, it later emerged that question had never been raised, preserved or passed upon in state courts; writ dismissed for want of jurisdiction). See also Supreme Court Rule 21.1(h).

CONCLUSION

The petition for writ of certiorari presents no issue warranting review, or properly reviewable, by this Court, and should be denied.

Dated: New York, New York
April 9, 1990

Respectfully submitted,

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